

ROBERT A. CARO

June 8, 2003

Senator Trent Lott, Chairman
Senator Christopher J. Dodd, Ranking Member
Senate Committee on Rules and Administration
305 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senators Lott and Dodd:

Several members of the Senate have asked me whether my research on the history of the Senate sheds light on the current debate over the role of the Senate with respect to President Bush's judicial nominations.

Defining the right of extended debate is always tricky. If it is being used against you, it is a vicious weapon of obstruction, whose use in a democracy is unconscionable. If it is you who is using that weapon, it is a great one to have in your arsenal.

Many times in America's history, the right of extended debate has been used to defend causes with which I profoundly disagree. In Master of the Senate, I tried to show how it was a last-resort, but very effective, barrier thrown up in the most ignoble of causes: the continuation of racial segregation.

Nonetheless, great care should be taken in placing new restrictions on that right. Senators who are considering doing so should understand that they will be taking a step that has significant implications for the balance of powers created under the Constitution, and also for another very fundamental concern in a democracy: the balance between majority and minority rights.

The writings of the framers of the Constitution make clear that Senators, whether acting alone or in concert with like-minded colleagues, are entitled to use whatever means the Senate rules provide to vigorously contest a President's assertion of authority with which they strongly disagree. One could say, in fact, that under the fundamental concept of the Senate as envisioned by the founding fathers, it is not merely the right, but the duty of Senators to do that, no matter how popular the President or how strongly the public opinion polls of the moment support the President's stand on the issue involved.

I said in Chapter 1 of Master of the Senate that

... in creating the new nation, its Founding Fathers, the Framers of its Constitution, gave its legislature ... not only its own powers, specified and sweeping ... but also powers designed to make the Congress independent of the President and to restrain and act as a check on his authority, [including] power to approve his appointments, even the appointments he made within his own Administration. ...

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And the most potent of these restraining powers the Framers gave to the Senate. ... The power to approve Presidential appointments was given to the Senate alone; a President could nominate and appoint ambassadors, Supreme Court Justices, and other officers of the United States, but only "with the Advice and Consent of the Senate."

I also pointed out that "the Framers wanted to check and restrain not only the people's rulers," but also the possibility that the majority will would be used, in Madison's words, "to oppress the minority." The Framers, he said, established the Senate as the body "first to protect the people against their rulers; secondly to protect the people against the transient impressions into which they themselves might be led. ... The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch." The Constitutional Convention adopted the two-House Congress with almost no dissent.

To give the Senate strong protections from transient public passions or executive pressure, the Convention kept the Senate small so that it would have, again in Madison's words, less propensity "to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions." To make the Senate more stable, to keep it "firm," and "to insure their independency" (Edmund Randolph), the Framers gave Senators terms three times as long as House members and half again as long as the President's. As a final layer of armor, only one-third of the Senate would be elected every two years, so that the Senate would change only gradually over time.

As I wrote, since the power of the President and the power of the people would be very strong under the Constitution, "to enable the Senate to stand against these powers - to stand against them for centuries to come - the framers of the Constitution made the Senate very strong."

I have pointed out that one of the first acts of the Senate was to write the 1789 statute setting up the federal judiciary system. Sixteen years later, the Senate was called upon to preserve and protect the independence of that system by standing up to Thomas Jefferson, a popular President with a majority in both Houses. Jefferson wanted the Senate to help him tilt the Supreme Court in his own direction, by convicting Justice Samuel Chase after the House had impeached him on a party-line vote. Jefferson had more than enough of his own party members in the Senate to convict Chase, but enough Senators from both parties voted against the President to sustain the independence of the Judiciary from the Executive. As your colleague Senator Byrd said some two centuries later, "The Senate exercised in that fine moment of drama the kind of independence, impartiality, fairness and courage that, from time to time over the years, it has brought to bear on the great issues of the country." The independent Senate had vindicated the Framers' hope that it would stand against the tyranny of presidential power and the tides of public opinion.

The Founders, in their wisdom, also gave the Senate the power to establish for itself the rules governing exercise of its powers. Unlike the unwieldy House, which had to adopt rules that inhibited debate, the Senate became the true deliberative body that the Framers

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had envisioned by maintaining the ability of its members to debate as long as necessary to reach a just result. For more than a century, the Senate required unanimous agreement to close off debate. The adoption of Rule XXII in 1917 allowed a two-thirds cloture vote on "measures," but nominations were not brought under the rule until 1949.

In short, two centuries of history rebut any suggestion that either the language or the intent of the Constitution prohibits or counsels against the use of extended debate to resist Presidential authority. To the contrary, the nation's Founders depended on the Senate's members to stand up to a popular and powerful President. In the case of judicial appointments, the Founders specifically mandated the Senate to play an active role, providing both advice and consent to the President. That shared authority was basic to the balance of powers among the branches.

Surrendering such authority is not something which should be done just because of a Senator's point of view on the particular issue of the moment — because much more than the particular issue is involved. What if a Senator — let us say a senator from a small-population state without any other means of defense — votes to support a new limitation on debate today? What will he do in some future year when he is trying to stop a bill or a nomination that a bare majority of the Senate supports, but that he and 40 colleagues believe will be terribly detrimental to their states or to the nation — an action that he feels a few members of the senate may change their view about if only he has enough time to explain the full consequences to them and to the public? What will he feel when he suddenly realizes that his right to hold the senate floor against that action has been so greatly reduced that the bare majority can silence him before he is finished making his case? What will he do when he realizes that, without the right of extended debate, his cause is ultimately helpless?

I am not attempting to say that the right of extended debate should not be modified. I am, however, attempting to say as strongly as I can, that in considering any modification Senators should realize that they are dealing not with the particular dispute of the moment, but with the fundamental character of the Senate of the United states, and with the deeper issue of the balance between majority and minority rights.

As I told a group of Senators last month, you need only look at what happened when the Senate gradually surrendered more and more of its power over international affairs to learn the lesson that once you surrender power, you never get it back.

Respectfully,

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